Beiträge

PÉTER BÓNIS, Budapest

The Tripartitum and the European ius commune, with special regard to the commentators

For the quincentenary of a Hungarian law-book

I. Introduction; II. The primeval and secondary law of nations in the Prologue; III. The custom in the Tripartitum; IV. The definition of judicial power in the Tripartitum; V. The self defense in the Tripartitum III. 21 – 24; VI. Conclusions.

I. Introduction

In 1514 Stephen Werbőczy presented the *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae* to the Hungarian legislative assembly, the diet. The Tripartitum was sent to inspection to committees, and the diet authorised the king to seal and distribute it. Finally, the king approved the text. Although the Tripartitum was not sealed and distributed, it acquired legal authority by the force of use and custom. In 1517 it was printed in Vienna.

The Tripartitum is the most important Hungarian law-book from the Middle Ages. This law-book retained legal authority until 1945. It was an important part of the customary Hungarian constitution, an unchangeable monument of the fundamental rights of the Hungarian nobility and the symbol of the independence of the Hungarian State.

The sources of the Tripartitum have been researched since the 19th century, at least in modern times. The first historian who engaged himself in this field, was an Austrian, Johann Adolf Tomaschek. In 1883 he published an extensive study on the *Summa legum Raymundi* and its relationship to Werbőczy's Tripartitum[1]). Tomaschek stated that the Summa legum was a compilation of an Austrian author, and important parts of the Tripartitum were copied from this Summa.

Hungarian legal historians have firmly rejected any speculation about the influence of any foreign legal system on Hungarian law, be it Austrian or European *(ius commune)*. As they explained, the Tripartitum was a law-book of specifically Hungarian legal institutions, and was not influenced by foreign legal systems. The Kingdom of Hungary did not receive Roman law at all, its legal system remained essentially customary and Hungarian[2]). If there are some copied sentences from Roman law in the Prologue, it is because Werbőczy intended to impress his audience by a display of legal knowledge, but the remaining three parts are the true Tripartitum, the true compilation of Hungarian law, where there is no trace of Roman law or foreign influence[3]).

[1]) *J. A. Tomaschek*, Über eine in Österreich in der ersten Hälfte des XIV. Jahrhunderts geschriebene Summa legum und ihre Quellenverhältnisse zu dem Stadtrechte von Wiener-Neustadt und dem Werbőczyschen Tripartitum, in: Sitzungsberichte der phil-hist. Klasse der Kaiserlichen Akademie der Wissenschaften in Wien 105 (1883), 241 – 328.

[2]) *Á. Timon*, Ungarische Verfassungs- und Rechtsgeschichte, 1904, 326.

[3]) For further elements see *G. Bónis*, Der Zusammenhang der Summa Legum mit dem Tripartitum, in: Studia Slavica Hungarica 11 (1965), 373; *B. György*, Középkori jogunk elemei, Budapest

After the dissolution of the Habsburg Monarchy, perhaps, we can fully appreciate the merits of Tomaschek without any nationalistic influence. I think, he did not want to undermine the authority of the Tripartitum.

Although the main conclusions of Tomaschek were confuted by German and Italian legal historians, he deserves praise, because he discovered this unpublished manuscript, and he called our attention on it. Certainly, the anonymous author of the Summa legum has nothing to do with Austria or Wiener-Neustadt, as it is a derivative compilation from the *Summa decretalium* of *Goffredus Tranensis,* as it was shown by Besta.

After Tomaschek, the sources of the Tripartitum remained a very debated question. Seckel demonstrated that the Summa legum was widely diffused in Eastern Europe[4]). József Félegyházy wrote a book on the influence of canon law on the Tripartitum, where he tried to identify not only canonical, but Roman law sources, as well[5]). He found citations from Gratian, Liber Extra, Hostiensis, Thomas Aquinas, all authors from the 12–13th centuries. Recently, David Ibbetson and Martyn Rady has made some valuable contribution, but these regard only the Prologue of the Tripartitum[6]).

Is it thinkable that Werbőczy did not use other than 12–13th century sources? Is it thinkable that there are "two Tripartitums", the Prologue and the remaining three parts, the true Tripartitum?

In the 500th anniversary of the Tripartitum, I think, it is time to pay attention to Italian commentators, as well, if we want to paint a more detailed picture regarding the sources of the Tripartitum. It is obvious that we cannot pretend to do all this huge work in this paper, and we can only highlight some interesting points from the Tripartitum, and we cannot publish here our investigations on the whole Tripartitum, but, I think, it is worth trying.

II. The primeval and secondary law of nations in the Prologue

The distinction made by Werbőczy between primeval and secondary natural law is one of the evidences of Bartolus' influence on the Tripartitum. The ancient Romans did not know this distinction, as it is explained by Ulpian: "Natural Law is that which nature has taught to all animals, for this law is not peculiar to the human race, but applies to all creatures which originate in the air, or the earth, and in the sea. Hence arises the union of the male and the female which we designate marriage; and hence are derived the procreation and the education of children; for we see that other animals also act as though endowed with knowledge of this law"[7]).

1972, 237–249; *G. Bónis,* Einflüsse des römischen Rechts in Ungarn, Ius Romanum Medii Aevi V.10., Milano 1964, 71.

[4]) *E. Seckel,* Beiträge zur Geschichte beider Rechte im Mittelalter, vol I. Tübingen 1898, 497–498; *K. Rebro,* Summa Legum Raimundi v. metskom práve na Slovensku, in: Sbornik filozofickej fakulty Univerzity Komenského 15 (1961), 155–170; *K. Rebro,* I manoscritti della Summa Legum Raimundi Parthenopei in Slovacchia, in: Atti del Convegno Internazionale di Studi Accursiani, Bologna 1963, vol III, Milano 1968, 955–980.

[5]) *J. Félegyházy,* Werbőczy Hármaskönyve és a kánonjog, Budapest 1942.

[6]) *M. Rady,* The Prologue to Werbőczy's Tripartitum and its Sources, in: English Historical Review 121 (2006), 104–145.

[7]) D. 1.1.1.pr.-2. Ulpianus (Transl by Scott).

The definition of Ulpian seemed strange to the glossators and commentators of the Roman law. In fact, it may be deduced from the definition of Ulpian that humans and animals can stipulate contracts, since according to Ulpian they are in the same community of rights.

To eliminate the theoretical difficulties, Bartolus declared in accordance with the Gloss[8]), that natural law and ius gentium can be considered in two ways. He asserted that only the primeval natural law is shared with animals, but the secondary natural law is shared only with humans[9]).

Bartolus divided the ius gentium into primeval and secondary one. The primeval ius gentium is what all people have applied, but the secondary ius gentium derives from the international agreements.

In the Tripartitum Werbőczy did not borrow the definition of Ulpian, but he adopts the definition of the ius commune. Werbőczy did not refer to the Romans' ius gentium, but he speaks about the ius gentium interpreted by Bartolus, one of the greatest commentators of the 14th century.

As Werbőczy stated, "the law of nations is of two kinds, namely, primeval and secondary. The primeval law of nations is what all peoples have applied since the beginning of time and what was created by natural wisdom, without any establishment by the people, such as not to hurt anyone, and so on. And that is not different from natural law, except in the way it is perceived. For it is called both natural law and the law of nations, but from different perspectives: natural, insofar as it emanates from natural reason; and of the law of nations, because the peoples have applied it without any specific establishment since the beginning of the world. And by this law, a slave has a free status, because according to natural law all men are born free"[10]).

As Webőczy asserted, "the secondary law of nations is the law that peoples have introduced not by natural reason but by reason of the public good and for common use. And it is oftentimes different from natural law. For by natural law everything was common and everyone free; but by the law of nations the division of land and the separation of property was invented which brought about war, captivity, slavery and other such things, contrary to natural law. This law of the nations brought about almost all contracts, such as buying, selling, lease and similar things." These theoretical positions are identical with Bartolus' one.

The concordance of the two sources is evidenced below:

[8]) Gl. *sed naturalia* ad Inst. 1.1.11., *de iure naturali, gentium et civili,* § *sed naturalia* (Lugduni 1618, coll. 24): "Hic § potest intelligi de iure naturali primaevo, quo moventur omnia animalia ad aliquid faciendum."

[9]) Bartolus, *Comm.* in D. 12.6.64., *de condictione indebiti,* l. *si quis* (Lugduni 1550, fol. 73ra).

[10]) The English translation of the Tripartitum is quoted in this article from *S. Werbőczy,* The Customary Law of the Renowned Kingdom of Hungary in Three Parts (the Tripartitum), ed and transl by *János M. Bak, Péter Banyó* and *Martyn Rady,* Budapest and Idyllwild 2005.

Tripartitum, Prologus, Tit. 2.	Bartolus, *Comm.* in D. 12.6.64., *de condictione indebiti*, l. *si quis* (Lugduni 1550, fol. 73ra)
§. 8. Jus gentium duplex est; scilicet primaevum, et secundarium. Jus gentium primaevum est: quo omnes gentes ab initio usae sunt, naturali ratione inductum absque aliqua constitutione gentium, ut neminem laedere etc. Et hoc a jure naturali nihil discrepat, nisi ratione diversorum respectuum. Nam jus naturale, et gentium pariter dicitur, sed diverso respectu; naturale scilicet; in quantum ratione naturali est inductum; gentium vero, in quantum gentes a principio orbis, sine illa constitutione alia eo usae sunt. Et hoc jure status servi est integer; quia naturali ratione omnes liberi nascebantur.	"Debetis tamen scire, quod ius gentium duplex est. Quoddam est ius gentium, quod fuit eo ipso quodam gentes esse coeperunt, naturali ratione inductum, absque aliqua constitutione iuris gentium, ut fidem seu promissa servaret libertus, et similes. Et isto iure gentium primaevo status servi non annihilatus, immo omnes erant liberi. (...)"
§. 9. Jus gentium secundarium, est jus, a gentibus non ratione naturali, sed ratione publici boni, et ad communem usum introductum. Et hoc saepenumero discrepat a jure naturali; quia jure naturali omnia erant communia, omnes erant liberi; de jure vero gentium, facta est divisio dominiorum, et rerum inventa separatio; introducta sunt bella, captivitates, servitutes, et alia hujusmodi, quae juri naturali sunt contraria. Ex hoc etiam gentium jure omnes pene contractus inducti sunt, ut emptio, venditio, conductio, et his similia.	"Quoddam est ius gentium, quo omnes gentes utuntur ex constitutione earum, non secundum rationem naturalem (...), ut bella, captivitates, servitus, distinctiones dominiorum."

III. The custom in the Tripartitum

The source of the treatise on customary law in the Prologue of the Tripartitum was unknown for the legal historians for a long time. In recent times, David Ibbetson identified the source of this part of the Tripartitum as borrowed from Bartolus[11]). We cannot but agree with him, but I think, it should be also added that Werbőczy used other sources in the treatise on custom, as well, not only Bartolus.

[11]) *D. Ibbetson*, Custom in the Tripartitum, in: *M. Rady* (ed), Custom and law in Central Europe, Cambridge 2003, 14–24.

According to Bartolus the custom has three requirements: a) the reasonableness *(rationabilitas)*, b) prescriptivity *(praescripta)*, c) the frequence of use *(frequentia actuum)*[12]).

Among these, the reasonableness was an important requirement of the custom even in Justinianic law. This requirement means according to the glossators[13]) that the custom, which is expressly disapproved by the legislator, cannot be held reasonable, because it cannot be reasonably presumed to be in accordance with the purpose of the legislator[14]).

The time required for prescription was a well-known requirement already before Bartolus. This requirement means that custom must receive force in the course of that time required for prescription. This requirement was not always necessary. E.g., Johannes Teutonicus denied it (ut sit praescripta)[15]). Glossators had discussions on what time is necessary for the custom. The civilians required ten or 20 years, but the canonists required 40 years in case of a *consuetudo contra legem.*

For Bartolus, the customary law has another requirement, the frequency of use, which was unknown to the glossators and commentators before Bartolus, except perhaps Hostiensis. This requirement means that the customary law needs to be repeated, because the consent of the people cannot be deduced from one single act. According to him, it does not suffice, if the custom is only prescriptive.

It was Bartolus who connected these three requirements for the first time, and made them the necessary condition of the customary law[16]). Werbőczy has also mentioned these three requirements, it is, therefore, evident that he accepted the teachings of Bartolus, even though he did not cite him word for word. The non litteral citation may be an evidence of that Werbőczy has not used Bartolus directly, and he might have used an indirect source. In fact, Bartolus was an influential, widely known jurist whose impact on civil and canon law was enormous.

Werbőczy defines customary law[17]) in accordance with Johannes Andreae, and not following Bartolus' definition after mentioning Gratian's one. This is an evidence for the use of an indirect source. Bartolus quoted a lot of definitions of various authors in his

[12]) Bartolus, *Comm.* in D. 1.3.32., *de legibus senatusque consultis et longa consuetudine*, l. *de quibus causis*, n. 11 (Lugduni 1550, fol. 22rab).

[13]) Around 1234 cfr. for the requirements Gl. *legitime sit praescripta* ad X.1.4.11., *de consuetudine*, c. *cum tanto* (Lugduni 1584, coll. 95.): "Ad hoc ut ergo consuetudo iuri communi praciudicet, requiritur primo quod rationabilis sit, et quod sit praescripta, ut hic, et c. cum eccl. Item quod ex certa scientia, et non per errorem sit inducta, ff. de leg. l. quid non ratione, et sciente illo qui potest ius condere. ... Et quod non sit contra ius naturale. ... Item requiritur quod sit usus illa consuetudine sive vicibus illis quibus usus est eo animo ut intendas, sive credas te ius habere. ... Item requiritur quod maior pars populi usa sit ea consuetudine ad hoc ut secundum eam iudicetur."

[14]) Gl. *rationabilis* ad X.1.4.11., *de consuetudine*, c. *cum tanto* (Lugduni 1584, coll. 95.): "Et quam consuetudinem dices rationabilem? Illam dico rationabilem, quam non improbant iura."

[15]) Gl. *contra* ad D. 12 c. 7 (Lugduni, 1581, coll. 411.): "Sed longum est illa, quod est decem vel xx annorum. ... Non ergo requiritur quod consuetudo ... sit prescripta."

[16]) Bartolus, *Comm.* in D. 1.3.32., *de legibus senatusque consultis et longa consuetudine*, l. *de quibus causis*, n. 11 (Lugduni 1550, fol. 22rab): "Et leges videntur ponere tria, scilicet frequens actus, ut C. e.l.j et C. de aedi. pri. l. an in totum et hic et in rubr. supra eo. tit. Secundo temporis diuturnitas, ut hic in gl. Tertio quod principium sit rationabile."

[17]) Trip. Prologus, tit. 10.: "Quod consuetudo est jus quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex."

commentaries, and finally he gave his own definition. However, Werbőczy does not accept Bartolus' definition of customary law, and he mentions another one, saying that "custom is a certain ius, introduced through the practices of whomsoever can by public authority enact laws"[18]). This definition is borrowed from the *Tractatus de consuetudine* of *Johannes Andreae*, and not from Bartolus or Gratian. This tractatus of Johannes Andreae was printed as a part of his commentary on the Liber Extra, but sometimes it circulated separately[19]). This long treatise on customary law reflects a huge influence of Bartolus, but Johannes Andreae does not always accept the views of Bartolus. It is probable that Werbőczy read the treatise of *Johannes Andreae*, or another civilian treatise depending from it. In the medieval ius commune this borrowing of contents was well-known between civil and canon law.

In the tit. 10 of the Prologue of the Tripartitum, Werbőczy quotes the definition of Gratian (or Isidorus) which recites: "Custom is a certain law, arising from practice, taken for law where law is deficient." This definition was borrowed by Gratian from Isidorus. The following sentence was cited from the *Summa legum:* "It is called custom, for it is, as it were, common practice and human use because it is in common use."

After this Werbőczy provides another definition: "But to be more clear: custom may (for our purpose) be defined thus: it is that certain ius, introduced through the practices of whomsoever can by public authority enact laws." This definition was not borrowed from Gratian, as Félegyházy[20]) stated, but from the *Tractatus de consuetudine* of *Johannes Andreae*. Werbőczy used a source deriving from Johannes Andreae who drew on Bartolus' commentary. Félegyházy stated falsely that after the definition of Gratian there is Werbőczys own definition, because it comes not from Werbőczy, but from Johannes Andreae. Szászy held it the most precious and original part of the Prologue, but he was wrong, because its real author was Johannes Andreae.

Describing the three requirements of custom, Werbőczy repeats the doctrine of Bartolus, as Johannes Andreae did so. According to him "first: custom must be reasonable. It is reasonable when it aims and advances the goal of law. The goal of canon and divine law is the beatitude of the soul. The goal of civil law is the common weal. Therefore, if a custom aims at the beatitude of the soul, it is reasonable by canon and divine law; and if it opposes an eternal goal, it is unreasonable. According to civil law, a custom is reasonable if it aims at the common weal"[21]). This above-cited definition of reasonableness of custom does not come from Bartolus. It derives from two decretalists of the 15th century, namely Antonius de Butrio and Dominicus de Sancto Geminiano, who stated that the goal of civil law is the common weal, therefore, if a custom aims at the common weal, it is reasonable by civil law; and if it opposes the common weal, it is unreasonable[22]). The glossators stated only that a custom may be regarded as reasonable, if it does not contradict natural law, the law of nations or human law.

As Werbőczy[23]) asserted, "secondly, custom must be prescriptive, i.e., it must last for an appropriate time and must receive force in the course of that time required for prescription. But this holds only for canon law and is not required even by that law unless it contradicts positive law. According to civil law, a decade, that is the passage of ten years, is sufficient for the introduction of a custom, even if it contradicts civil law. If, however, a custom contradicts canon law, then the space of forty years is required. Yet, if a custom is introduced in the absence of law, then, even in respect of canon law, a decade seems to be sufficient. The passage of ten years begins from the time the first act is performed by the people"[24]).

Thirdly, as Werbőczy asserted, according to the common opinion of the doctors, repetition of the act is needed. Say, however, that a repeated act is not in itself necessary for the establishment of a custom. But because the consent of the people cannot be deduced from one single act, the repetition of the act can be seen as the cause and custom as the effect. And it is necessary to have so many and such well known acts that it becomes in all likelihood known to most of the people, for it is not the act but the tacit consent of the people that establishes custom. Thus, when the tacit consent of the people can be deduced, then the great recurrence of acts is unimportant. What is more, a custom can occasionally be introduced by a single act with a repeated cause lasting for as long as it takes to establish a custom; for example, a custom can be introduced if someone has a bridge on the public road or something of this kind"[25]).

As Werbőczy stated, customary law has three effects. Namely, explanatory, as it is the best interpreter of the law, abrogatory, because it supersedes law when contradicts custom, and substitutive value, because it replaces law, where this is deficient. As to the three effects of customary law, we can say that these derive from the civilian glossators, e.g. from Azo, and not from Hostiensis[26]), as it was stated by Félegyházy.

[18]) Trip. Prologus, tit. 10.: "Sed clarius, consuetudo (prout nostrum propositum tangit) sic diffinienda videtur: Est jus quoddam, moribus illius introductum, qui authoritate publica legem condere potest. Ideo appellatione juris, venit etiam consuetudo."

[19]) *J. Andreae, Tractatus de consuetudine*, post *Comm.* in X.1.4.11., *de consuetudine*, c. *cum tanto* (Venetiis 1581, fol. 62vb): "Consuetudo est jus quoddam, illius moribus introductum, qui auctoritate publica legem condere potest."

[20]) *J. Félegyházy*, Werbőczy Hármaskönyve és a kánonjog, Budapest 1942.

[21]) Trip. Prologus, tit. 10.: "Primo, ut sit rationabilis. Est autem rationabilis, cum tendit et accedit ad finem juris. Finis autem juris canonici, et divini: est felicitas animae. Finis vero juris civilis, est bonum publicum. Ideo si consuetudo tendit ad felicitatem animae, est rationabilis secundum jus canonicum, et divinum; si autem repugnat fini aeterno, est irrationabilis. De jure vero civili consuetudo est rationabilis, si tendit ad bonum publicum. Et quia in hoc non sunt speciales regulae, dic: quod consuetudo, quae non est contra jus naturale, gentium, vel scriptum, praesumitur rationabilis."

[22]) *R. Garré*, Consuetudo. Das Gewohnheitsrecht in der Rechtsquellen- und Methodenlehre des ius commune in Italien (16.–18. Jahrhundert), Frankfurt/Main 2005, 169 (Fn 44).

[23]) Trip. Prologus, tit. 10.: "Secundo requiritur, ut sit praescripta, id est, habeat tempus debitum, et per cursum illius temporis ad praescriptionem requisiti firmetur."

[24]) Trip. Prologus, tit. 10.; *S. Werbőczy*, The Customary, 33.

[25]) Trip. Prologus, tit. 10.: "Tertio requiritur frequentia actuum, ut est communis doctorum sententia. Dic tamen, quod actus frequens de se non est necessarius ad consuetudinem inducendam, sed quia per usum colligitur consensus populi, qui plerumque non potest ex uno solo actu colligi: igitur frequentia actuum est ut causa, consuetudo vero, ut causatum. Requiruntur autem tot actus, et ita notorii, ut verisimiliter transiverit in notitiam populi; non tamen actus, sed tacitus consensus populi, inducit consuetudinem. Unde ubicunque ex conjecturis habetur tacitus consensus populi: tunc non curatur de magna frequentia actuum. Imo aliquando ex uno actu, si habuerit causam successivam, et continuationem per tempus, infra quod consuetudo inducitur, ut si quis supra viam publicam pontem habuerit, vel quid tale, potest induci consuetudo."

[26]) Azo, *Summa* in C. 8.52., *quae sit longa consuetudo*, n. 6 (Venetiis 1595, coll. 874.): "Et quidem videtur quod consuetudo sit conditrix legis, abrogatrix et interpretatrix." Gl. *imitatur* ad C. 8.52.3., *quae sit longa consuetudo*, l. *leges* (Parisiis 1559, coll. 1964.).

IV. The definition of judicial power in the Tripartitum

One of the most spectacular, although less important evidences of the adherence of Werbőczy to Bartolus is the Titulus 14 of the Prologue. In this part, Werbőczy states that "the office of the judge is the relevant right granted to the same judge to carry out those things that he is held to do as a judge. The office of the judge relates to jurisdiction as a plaint to obligation. As one obtains by plaint what comes from obligation, so what is brought into effect through the office of judge comes from jurisdiction, and he puts it into action."

Petrus de Bellapertica defined the iurisdictio as a right, and the office of judge as an exercising of this right *(iurisdictio est ius, officium est exercitium ipsius iuris)*. As Bartolus has it, the office of the judge is the relevant right granted to the same judge to carry out those things that he is held to do as a judge[27]).

The officium iudicis was an equivocal term in the ius commune. It had various meanings. Sometimes the *officium iudicis* was implored *(implorare iudicis officium)*, if an *actio* was not granted by law to the plaintiff, especially when there has not been an obligation before. Therefore, the actio and the officium iudicis were two alternative ways of obtaining legal remedy, but in the same time there was a need to distinct one from another. However, Werbőczy did not use this citation in its original context, and for this reason, we can suppose that he did not use directly Bartolus, but an indirect source.

The concordance of the two sources is evidenced below:

Tripartitum, Prologus, Tit. 14	Bartolus, *Comm.* in D. 2.1.1., *de iurisdictione*, l. *ius dicentis officium*, n. 10. (Lugduni 1550, fol. 56ra)
"Officium autem judicis est jus competens ipsi judici ad ea, quae sibi ut judici facienda incumbunt, peragenda praestitum. Differt autem officium judicis a jurisditione, sicut actio ab obligatione. Nam ut per actionem quis consequitur, quod in obligatione venit; ita per officium judicis ad effectum perducitur, quod in jurisdictione venit."	"Officium iudicis est ius competens ipsi iudici, et est ius faciendi ea, quae sibi ut iudici facienda incumbunt (...), et differt a iurisdictione, sicut actio ab obligatione. Nam sicut per actionem consequitur quis, quod in obligatione devenit; ita per officium iudicis ad effectum producitur, quod venit in iurisdictione."

V. The self defense in the Tripartitum III. 21–24

The issue of the legitimate self-defense has been one of the most debated questions in criminal law for centuries. The ancient Romans' criminal law was rather rude and penal law was not a separate branch of law in Rome. In the Middle Ages, the glossators made a new branch of law of which one of the first text-books was the Tractatus maleficiorum of Albertus Gandinus.[28]) Penal law reached a considerable scientific level at the time of Werbőczy, and many treatises of penal law were available to him. The chapters on self-

[27]) Bartolus, *Comm.* in D. 2.1.1., *de iurisdictione*, l. *ius dicentis officium*, n. 10. (Lugduni 1550, fol. 56ra).

[28]) *H. Kantorowicz*, Albertus Gandinus und das Strafrecht der Scholastik, vol II, Berlin – Leipzig 1926.

defense indicate that Werbőczy was acquainted with this legal literature, at least as to the legitimate self-defense.

In accordance with the Glossa[29]), any person attacked by another, should have the right to counteract aggression against his own person or his goods, only if a controlled amount of blameless force *(cum moderamine inculpatae tutelae)* was used. Self-defense, therefore, requires a) proportionality, b) immediacy, c) intention of defending.

Aggression can be repelled by many ways. The defender was required to choose the less harmful way of defending. The ratio communis requires that the harm to be prevented significantly outweighs the harm that will be inflicted. The defender has to estimate the dangerousity of the assailant. Proportionality is assessed mainly by establishing which instruments and weapons were used, what was the physical force of the defender and aggressor like. An unarmed attack is not permitted to be fended off with arms, but a person may defend himself with weapons against an attack with arms. The legitimate defense ought to take into consideration the physical force of the attacker, and for this reason, if an assailant can cause such a harm, that could be prevented by the weaker defender only with arms, it is deemed that the legitimate defense is conducted in due proportion, if he uses a sword. It is very difficult to assess the proportionality, because on the other side there is only a potential harm, as the attacked person is not obliged to expect the end of the attack, in order to know clearly what is the real intention of the attacker. As Bartolus stated, approaching another one with an unsheathed sword entitles the other person to counteract danger. Werbőczy has a similar opinion, when he states that "if a person approaches another with an unsheathed sword it may at once be presumed that he plans either to kill him or to inflict a wound"[30]).

Accourding to the Gloss stated, the second requirement of the legitimate self-defense is the immediacy of the defense. The legitimate self-defense situation lasts as long as the unlawful attack. It ceases, if the unlawful attack ends. The defender, therefore, must be exposed to attack, when the self-defending action is going on. According to the Gloss, returning the blow after interruption is not an act of self-defense, but rather of vengeance. Those actions that aim to revenge, and not to self-defense, do not fall within the scope of legitimate self-defense. If someone has been struck, and the attacker runs away, but the offended person starts to pursue him, to return the blow, this is not an act of legitimate self-defense, but rather of revenge. According to Werbőczy, "if he has been already struck, and the striking stopped for a time, then he had no right to return the blow after the interruption; for by doing so, it may be considered and judged that the return blow was not an act of defense but rather of vengeance: unless, the person struck was perhaps acting to escape other fresh blows which his attacker inten-

[29]) Gl. *moderatione* ad C. 8.4.1., *unde vi*, l. *possidenti* (Lugduni 1627, coll. 2054.): "Moderamen circa tria attenditur. Primum, ut si armis inferatur violentia, et armis repellatur. Si sine armis, simili modo repellatur. ... Secundum, ut in continenti flagrante adhuc maleficio violenter invasor repellatur. ... Tertium, ut ad defensionem, non ad ultionem seu vindictam. ... Item circa illud quod dixi de moderamine, primo quaeritur: Quid si pugnus unius plusquam alterius ensis percutit? Respondeo: defendat se ense propter inequalitatem virium, cum vim vi repellere omnia iura proclament. ... Item numquid est necesse ut prius percuti expectes? Quidam dicunt quod sic. ... Tu dic quod sufficit terror armorum, vel iactatio percussionum."

[30]) Tripartitum III.21.1.: "Nam, qui gladio evaginato alterum aggreditur, statim praesumitur, quod aut necem illi inferre, aut lethalia vulnera infligere machinatur."

ded to repeat and continue. In other words, there is a difference between defense and vengeance: defense takes place at once; vengeance after a delay"[31]). As it appears clearly, Werbőczy adheres to the Gloss.

It is an act of legitimate self-defense, if the unlawful attack has not yet been started, but there is a possibility that it can be carried out. If somebody has been threatened to be killed, then the possibility of an unlawful attack is actual. Therefore, it was deemed as a self-defense situation by the Gloss, if the person was of the habit of putting his threats into effect. But if he was a weaker person or without arms, it was not deemed a self-defense situation. This was the opinion of Bartolus, as well[32]).

Baldus had a different opinion. He stated that a person who threatens to attack, did not start the commission of the crime, the verbal menace, therefore, can be only proportional with the verbal self-defense, but with the physical one not. According to Baldus, in the case of verbal threats, everybody should expect, and it is not permitted to re-attack[33]). There is only one exception, which is unknown to the Gloss. According to Baldus, it is permitted to carry out self-defending action against a verbal menace, only if the delay would be dangerous, because the person who threatens to attack is waiting for others to join him.

Werbőczy dedicates a separate paragraph to the question. As Werbőczy has it, "it must be said that although it is not permitted by the law and approved custom of our realm to attack another in response to threats or menaces (except in case and act of arson, where the person who threatens to set fire to and burn down a city, village, or another person's house is usually punished by death), nevertheless, by common law, if the man who threatened to kill another usually puts his threats into effect, and especially if he is powerful and has the habit of beating others, then (because the same act can be presumed again from his side) self-defense as well as attack is allowed, in order to avoid being killed. However, if the person is not of the habit of beating others or of putting his

[31]) Tripartitum III.21.6.: "Si autem fuit jam percussus, et cessavit actus percussionis per aliquam moram: tunc non est sibi licitum repercutere post moram. Quia hoc modo non defensio, sed vindicta potius illa repercussio censetur atque judicatur. Nisi forte percussus faceret, ut evaderet alias percussiones, quas aggressor de novo facere et continuare praetendebat. Et sic differentia est inter defensam et vindictam, quia defensa sit in continenti, vindicta autem post moram infertur."

[32]) Bartolus, *Comm.* in C. 2.19.9., *de his quod metus causa*, l. *metum* (Lugduni 1552, fol. 95va): "Quando minae inferuntur, debet inspici persona inferentis minas. Sunt enim quidam potentes et ita mali quod illud quod dicunt, consueti sunt facere, tunc esset iustus metus ex minis et iactationibus, ut supra eo. l. si donationis. Si vero erat quidam homo, quod consuevit multum dicere et modicum facere, tunc non esset iustus metus."

[33]) Baldus, *Comm. (rep.)* in C. 8.4.1., *unde vi*, l. *possidenti*, n. 16 (Venetiis 1615, fol. 134vb): "Sed numquid solis minis minatus possit percutere minatorem? Glossa dicit quod sic, si consuevit minas suas minator exequi, nam tales minae terrorem inferunt, ut l.j. si quacumque et l. 1 si rec. provin. Nam consuetudo et qualitas personae debet attendi in talibus, l.j. si quis imp., l. si de act. et obl. facit quod nota ff. de arb. l. licet (D. 4.8.15). Mihi videtur contra, quia licet minetur, non incipit delinquere facto, sed tantum verbo, nec procedit ad actum proximum, et ideo verbis resisti contrario verbo debet, non ad manus et ferrum veniri, facit quod no. in Spec. de accu. ver quid si vocavi te latronem. Verumtamen si in mora expectationis esset periculum, ex quo liquet de animo, starem cum glossa."

threats into effect, then it is permissible to argue with him and resist him by words, and not by arms or sword. Except perhaps if he is waiting for others to join him"[34]).

It is clear from the Tripartitum that Werbőczy has accepted the doctrine of the ius commune on self-defense. Werbőczy refused to adhere to the Gloss, and he did not accept the views of Bartolus, either, but he followed the doctrine of a later commentator, Baldus. Werbőczy did not accept the teachings of the Gloss or Bartolus, because it was not sufficient for him that the assailant is able to put his threats into effect, as it sufficed for the Gloss or Bartolus. Werbőczy mentions an important exception, which was formulated by Baldus, because according to Werbőczy it is legitimate to repel the defender, who is waiting for others to join him, because the delay would be dangerous.

The use of these words makes it undeniable that Werbőczy was acquainted with the commentary of Baldus on the Codex Iustinianus, or at least he used a textbook drawn on Baldus. We could mention here the commentary of Angelus Aretinus[35]) on the Institutes, which is not entirely identical, but many keywords are the same.

As the Gloss states, the third requirement of the legitimate self-defense is the intention of defending. If there is no intention of defending, the counteracting conduct amounts to revenge. The intention of defending may be inferred from the circumstances. The unproportional defense is always an indication of revenge. The Gloss presumed the intention of defending, if the unlawful attack was going on. Werbőczy requires the intention of defending, as well, as he states that "regarding the protection of body and person, self-defense can be done and is allowed only immediately and before the wrong is completely finished or in the same fight and struggle during the commission of the first crime: that is, before the attacker (or the person who struck first) departs from the scene. For, as previously explained, if it is done afterwards, it cannot be called self-defense but vengeance"[36]).

Another important question treated by Werbőczy in the Tripartitum was the duty of retreat. The unlawfully attacked person is often able to escape or to withdraw, but in these cases the self-defending action would be unnecessary and unproportional. It

[34]) Tripartitum III.23.1–2.: "Dicendum, quod licet de regni nostri lege et approbata consuetudine, propter minas et comminationes non sit licitum cuipiam alterum offendere (praeter combustionis et incinerationis articulum atque casum, in quo quilibet civitatem aut villam, vel alterius domum succendere, ignisque voragine conflagrare minatus, morte damnari solet): de lege tamen communi, si homo ille, qui minatus alteri mortem, solitus est minas suas executioni demandare, praesertim si fuerit potens et alias consuetus percutere (quia verisimiliter hoc idem praesumitur etiam de isto), mortis evitandae gratia admittitur defensa, pariter et offensa. Verum si non fuit solitus alias percutere, nec minas suas executioni demandare: tunc verbis quidem resistere, et ei contradicere permittitur, sed non ferro vel gladio; nisi forte ille expectaret socios, et mora periculum esset allatura."

[35]) Angelus Aretinus, *Comm.* in Inst. 1.2.2., *de iure naturali, gentium et civili*, § *sed ius quidem civile*, n. 9 (Venetiis 1609, fol. 15va): "Quid si minatus est mihi, an possum eum licite offendere? Bar. in d.l. metum C. quod me.cau. dicit, quod si ille erat homo consuetus minas suas executioni mandare, quod est iustus metus, alias non, facit quod notat Bar. in l. de pupillo § si quis ipsi praetori. ff. de no. op. Sed Baldus in l. 1. C. unde vi, dicit, quod immo verbis est resistendum, et non ferro, nisi ille expectaret socios, et mora esset pericula allatura."

[36]) Tripartitum III.22.1.: "Quantum igitur ad corporis et personae tutelam: debet fieri et admitti defensa in continenti, et ante consummatam injuriam, vel in eadem pugna et contentione, flagrante adhuc primo crimine, antequam scilicet aggressor vel primus percussor de loco recedat. Nam si postea fieret: non defensa (prout praenarratum est), sed vindicta diceretur."

may be asked whether self-defense can be alleged by somebody who was able to retreat. There was a lot of discussion among the glossators on the duty of retreat. Everyone was required to withdraw when retreat would not endanger his honour. The clerical persons were always required to withdraw, but the military persons were not[37]). Bartolus thought, that no one is required to retreat, and everyone has the right to counteract aggression[38]). Baldus taught, that if injury affects only his property rights, everyone is entitled to expel foreign invaders, but in case of an attack against persons, it is legitimate to counteract if flight exposes one's life or honour to danger. If there is a danger of being attacked from behind, there is no need to retreat[39]).

Werbőczy holds the duty of retreat to be mandatory for everyone, although the text is not clear, and we could also presume that retreat was required by Werbőczy only in case of an attack against life, but in case of an attack against property rights, it was not, as Baldus stated. In fact, Werbőczy explains[40]) that one has to withdraw, if he can escape without a harm of his person and honour, hence we can deduce, that he has not to withdraw, if he can escape without a harm affecting his property rights, as Baldus stated.

In case of violent crimes, it is often impossible to elucidate who was the aggressor and who was the defender, who bate the other for the first time, that is who was the defender and who was the assailant. According to the Gloss, both are to be acquitted[41]). Baldus states, that everyone is an unlawful assailant, therefore punishable. According to Werbőczy, if it does not emerge clearly from testimony or otherwise which blow preceded the other, then the guilty will fall on the person who provoked the other to fight

[37]) Huguccio Pisanus, *Summa Decretorum*, Tom. I. Distinctiones I-XX, Vatican City 2006, 42.: "Ex his omnibus patet quod nullus debet repercutere."; Goffredus Tranensis, *Summa* in X. 5.12., *de homicidio*, n. 6 (Venetiis 1586, fol. 205ra): "Ad hoc dicunt quidam quod licet laicis, clericis vero non. Ego credo quod clericis et laicis licet iniuriam propulsare et repercutere."

[38]) Bartolus, *Comm.* in C. 8.4.1., *unde vi*, l. *possidenti*, n. 8 (Lugduni 1552, fol. 110rb): "Si ego potui evadere fugiendo, et nolui, sed volui resistere, an liceat? Et quidam distinguunt: Aut est persona cui fuga est verecundia, aut non. Mihi videtur indistincte dicendum, quem non debere fugere, nam aliquem fugatam esse est iniuria, ut l. item apud, § j. ff. de iniur., ergo propulsanda ista iniuria."

[39]) Baldus, *Comm. (rep.)* in C. 8.4.1., *unde vi*, l. *possidenti*, n. 12 (Venetiis 1615, fol. 134ra): "Sed pone quidam fecit insultum contra me. Ego poteram a facie eius fugere. Non feci hoc, sed percussi eum. Queritur an puniar? Videtur quod sic, quia aliter poteram me defendere, scilicet fugiendo, et terga vertendo, et quilibet tenetur rumores fugere, nec se eis accomodare, ut ff. de poe. l. capitalium, § solent. Item ponere manus ad arma debet esse ultimum refugium et ultimum subsidium. Solutio: aut violentia infertur circa res ad earum occupationem vel destructionem, et non debet quis fugere, quia fuga trahit secum periculum. ... Aut circa personas, non respectu rerum occupandarum, tunc aut fuga importat periculum, ut quia inimicus est sibi ad spatulas, et terga vertendo posset de facili vulnerari, tunc non debet fugere. ... Aut fuga importat periculum honoris, et idem secundum Iacobum quia quilibet tenetur et debet honorem suum tueri, et omni lucro preferre, ff. si quis omis. cau. test. l. Iulia. Aut fuga nullum importat periculum, sed cautelam quandam, tunc debet quis fugere, quia sibi non nocet, et alii prodest."

[40]) Tripartitum III.21.4.: "Quod si vero aggressus cum honore et salvatione personae suae aggressorem evadere poterit: tunc evadere et minus malum, ne maius sequatur, evitare tenetur."

[41]) Gl. *sibi* ad D. 9.1.11., *si quadrupes pauperiem fecisse dicatur*, l. *cum arietes* (Lugduni 1627, coll. 1014.) "Sed quid si non apparet quis fuerit aggressus? Responde: neuter alteri tenetur, arg. infra ad legem Aqui. l. scientiam § cum instrumenta."

and to strike a blow.[42]) Werbőczy's opinion is identical with the teachings of Angelus Aretinus[43]).

In Tit. 24 of Part III, Werbőczy puts a further question: whether one can come to the help of another unlawfully attacked person. This chapter is fully in accordance with the ius commune. According to natural law, only an attacked person has the right to defend. The legislator must carefully weight, if he extends or not the right to defend to other by-standing people. However, this can be dangerous, because these violent fights and firing can result in an all-in-wrestling. The commentators of the ius commune were aware of this danger, and hesitated to extend the right to defend to everybody. A special affection was required by the Gloss[44]), and it was the reason why the Gloss acknowledged the right to defend the son, the parents, the spouse or the concubine. However, according to the Gloss, a stranger who is called on for assistance, can not come to the aid of an attacked person.

As Baldus taught[45]), if the attacked person is asking for help, every person, even a stranger is permitted to come to the aid of another to defend him from attack, as Bartolus taught already. Werbőczy follows the doctrine of the commentators saying that "anyone, even a stranger, who is called on for assistance, can always come to the help of a person he sees placed in mortal peril"[46]). The source deriving from the ius commune is betrayed by a sentence where there is a reference to the defense of property rights, as a justification, because applying the Roman norm regarding the defense of property to personal self-defense was an often used argumentation by the glossators and commentators.

VI. Conclusions

Which conclusions can be deduced from this research? Above all, it became clear that the source of the Tripartitum was not the ancient Roman law, because Werbőczy did not quote and use the sources of Roman law, but the authors of the *ius commune*, that is the glossators and commentators who were the most up-to-date legal sources of that time. Glossators and commentators have substantially transformed and changed Ro-

[42]) Tripartitum III.21.7.: "Si autem non apparet ex testimonio vel aliunde, quae percussio praecessit aliam, tunc culpa in illum praesumatur, qui alterum ad contentionem et percussionem provocavit."

[43]) Angelus Aretinus, *Comm.* in Inst. 1.2.2., *de iure naturali, gentium et civili*, § *sed ius quidem civile*, n. 7 (Venetiis 1609, fol. 15rb): "Hoc casu potest intelligi quod praesumatur culpa in eo, qui provocavit."

[44]) Gl. *nam iure* ad D. 1.1.3., *de iustitia et iure*, l. *ut vim* (Lugduni 1627, coll. 15.): "Sed quid si ob tutelam rerum suarum? Responde idem, dummodo cum moderamine, ut C. unde vi, l.j. (C.8.4.1). Item quid si ob tutelam alterius? Responde affectionem considerari."

[45]) Baldus, *Comm. (rep.)* in C. 8.4.1., *unde vi*, l. *possidenti*, n. 12 (Venetiis 1615, fol. 134ra): "Queritur an cessante qualibet speciali affectione, possit quis assumere defensionem hominis ignoti? Et videtur quod non, quia gl. l. ut vim, dicit affectionem ponderari, sed ad ignotum nulla est affectio saltem singularis et notabilis. In contrarium videtur, praesertim si offensus exclamat: accurrite, accurrite. Primum, quia in defensionem rerum hoc licet, ut no. in lege 3 § eum igitur, de vi et vi ar., infra tit.1. l. 1, ergo multo magis in defensionem personarum."

[46]) Tripartitum III.24.: "Adhuc quaeritur: an alius alium possit adjuvare? Dicendum, quod sic. Nam si pro tutela rerum, et haereditatum mearum possum amicos et fratres convocare: longe fortius pro corporis et personae meae defensione. Unde quilibet, etiam extraneus, dum in adjutorium acclamatur, poterit illum, quem in periculo vitae constitutum viderit, semper adjuvare."

man law. In the Tripartitum there is no close adherence to Roman law. Roman terms are used to describe medieval institutions. The texts of the commentators are applied to produce arguments to answer the needs of the Hungarian medieval society.

We have shown that Werbőczy used the legal sources of his own time, he was not behind his time. He was not backward or behind his time regarding canon law sources, as well. He used not only 12–13th century old canonical literature, but he studied decretalists from the 14–15th centuries, e.g. Johannes Andreae, Antonius de Butrio, and Dominicus de Sancto Geminiano. However, the proportion of canonical sources was not as important as Félegyházy and other Hungarian legal historians thought. Werbőczy paid much more attention to the civilian sources than the canonical ones. Bartolus and Baldus exerted much more influence on Werbőczy than the canonists did, whose importance is represented by the fact that they intermediated the doctrines of the civilians, instead of giving his own contribution.

The above-mentioned and discussed sources of Werbőczy are evidences that Werbőczy was not a half-educated and isolationist jurist of a backward country, but he was fully acquainted with the European legal science. The legal knowledge of Werbőczy was a modern and up-to-date legal knowledge.

We have shown, as well, that there is no reason to discriminate between the Prologue and other parts of the Tripartitum. Important citations from the ius commune, from Bartolus and Baldus were incorporated not only in the Prologue, but also in the three other parts of the Tripartitum. We have shown that the self-defence doctrine of ius commune was incorporated in the third part of the Tripartitum, and these legal ideas from the learned law had a huge importance in the everyday legal practice. It was not a display of legal knowledge and learning[47]).

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